

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANDT DAVID WHETSTONE,)	
)	
Petitioner,)	3:05-cv-0053-ECR-RAM
)	
vs.)	
)	ORDER
DIRECTOR, NEVADA DEPT. OF)	
CORRECTIONS, <i>et al.</i> ,)	
)	
Respondents.)	
	/	

On September 26, 2005, the Court entered an Order dismissing the habeas corpus petition in this case (docket #17). Judgment was entered on the same day (docket #18).

Subsequently, petitioner filed a Application for Certificate of Appealability (docket #20) and a Notice of Appeal (docket #21). Respondents have opposed the application for a certificate of appealability (docket #22). Petitioner was permitted to proceed *in forma pauperis* in litigating this petition and that status shall continue on appeal.

The Court will, however, deny petitioner's application for a certificate of appealability. The standard for the issuance of a certificate of appealability calls for a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c). The

1 Supreme Court has interpreted 28 U.S.C. §2253(c) as follows:

2 Where a district court has rejected the
3 constitutional claims on the merits, the
4 showing required to satisfy §2253(c) is
5 straightforward: The petitioner must
6 demonstrate that reasonable jurists would find
7 the district court's assessment of the
8 constitutional claims debatable or wrong. The
9 issue becomes somewhat more complicated where,
10 as here, the district court dismisses the
11 petition based on procedural grounds. We hold
12 as follows: When the district court denies a
habeas petition on procedural grounds without
reaching the prisoner's underlying
constitutional claim, a COA should issue when
the prisoner shows, at least, that jurists of
reason would find it debatable whether the
petition states a valid claim of the denial of
a constitutional right and that jurists of
reason would find it debatable whether the
district court was correct in its procedural
ruling.

13 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also *James v.*
14 *Giles*, 221 F.3d 1074, 1077-79 (9th Cir. 2000).

15 The Court finds that petitioner has not met this
16 standard. Petitioner was undoubtedly untimely in filing his federal
17 petition for writ of habeas corpus, allowing more a year to pass
18 between the time his conviction became final and his arrival before
19 this court. His arguments for equitable tolling were unavailing as
20 he failed to demonstrate that he diligently pursued his state
21 actions or that some extraordinary circumstance beyond his control
22 prevented his coming to this court in a timely manner.

23 Moreover, his attempt to supplement the record with
24 medical records indicating mental health and addiction treatment in
25 1986 is inappropriate and unconvincing. As previously discussed,
26 petitioner's alleged mental state at the time of his crime and his

1 criminal trial do not account for his delay in pursuing his federal
2 habeas corpus remedies. The records address a period of time
3 almost a decade prior to petitioner's visit to this Court.

4 **IT IS THEREFORE ORDERED** that petitioner's Application for
5 Certificate of Appealability (docket #20) is **DENIED**.

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7 Dated this 7th day of December, 2005.

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12 UNITED STATES DISTRICT JUDGE
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